Supreme Court, U.S.
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No. 01-419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

In its petition, the City of Columbus showed that this case satisfies the customary explanations for granting review. It squarely raises a recurring federal question—whether 49 U.S.C. § 14501(c)(2)(A) allows States to delegate safety enforcement or regulatory authority to municipalities regarding the use of tow trucks within their city limits. It presents an opportunity to resolve a mature and ongoing division of lower-court authority that now involves five federal courts of appeal. It concerns a conflict that not only has divided the federal courts of appeal but also has generated conflicts between state and federal courts *within the same geographic jurisdictions* (Michigan and California). It relates to an essential public-safety issue that virtually every major city in the country has attempted to address through regulations akin to those challenged here. And it concerns a lower-court decision that fails to follow the analytical path marked by *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), and more generally fails to adhere to this Court's traditional interpretive rules.

Since the petition was filed, eight States (including California, Florida and Texas) and the International Municipal Lawyers Association (along with several cities) have filed *amici curiae* briefs that support each of these points and more. As the State *amici* brief (Br. 1, 7-8) confirms, "[a]ll States delegate considerable police power authority to cities, counties, and municipal associations" and thus "only a clear congressional directive can override the presumption in favor of leaving to the States the decision whether and how to delegate reserved police powers." The municipality *amici* brief (Br. 3-5) adds, "the tow truck business has traditionally and for many years been regulated solely on a local basis," where cities not only have long been "local respositories of the states' regulatory authority," but also have made up "92% of the 'safety regulatory authority' of the states."

In their brief in opposition to the petition, respondents understandably take a different tack. But, in doing so, they do not contest the importance of the question presented or the significance of the inter-circuit conflict. They instead attempt to gloss over this division by claiming that there is no "practical" conflict among the courts of appeal (Opp. 1). According to respondents, all courts have held that regulations governing the safety of *nonconsensual* towing operations are not preempted by 49 U.S.C. § 14501(c)(1) but that regulations governing *consensual* towing services are preempted (Opp. 6-9). Respondents' argument concerning nonconsensual tows is a red herring, while their assessment of the lower courts' treatment of consensual towing regulations is simply wrong. No less fundamentally, respondents' contention ignores the position of the national Towing and Recovery Association, the parent organization of one of the respondents here, which took exactly the opposite position two years ago in recommending that the Court grant review of the Second Circuit's decision in *Ace Auto Body*. The issue deserves the Court's time and attention.

1. At no point do respondents raise, or even hint at, a procedural obstacle to reviewing the question presented. No jurisdictional impediments exist, a final appealable order is in place, and there is no independent and adequate state ground precluding review. Nor do respondents argue that any of the City's arguments have been waived or otherwise lost.

2. Respondents also conspicuously fail to dispute the argument raised in the petition (Pet. 14-15), and seconded in the two *amici* briefs, that this federal issue is an important one. Whether one considers the vantage point of States or cities, large cities or small ones, federal courts or state courts, all have a stake in the issue, and all stand to benefit from guidance regarding its appropriate resolution. As reflected, moreover, by the certiorari petition filed in ***People ex rel. Renne v. Servantes***, 103 Cal. Rptr. 2d 870 (Cal. Ct.

App. 2001), ***review denied***, No. S0995954 (Cal. May 16, 2001), ***petition for cert. filed***, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336), and as reflected by the certiorari petition and *amici* brief filed in ***Ace Auto Body & Towing Ltd. v. City of New York***, 171 F.3d 765 (2d Cir.), ***cert. denied***, 528 U.S. 868 (1999), the tow-truck industry itself has an interest in resolving the question at hand.

3. Respondents also do not, and cannot, deny that the courts of appeal and state courts have issued conflicting decisions about whether municipalities may promulgate or enforce safety regulations under 49 U.S.C. § 14501(c)(2)(A). Several lower courts (including many of the courts on which respondents rely) have expressly acknowledged a conflict over the question presented and explicitly rejected the analysis of opposing courts. The Fifth Circuit, for example, recognized in ***Stucky v. City of San Antonio***, that "[t]he Courts of Appeals for the Sixth, Ninth, and Eleventh Circuits have each held that § 14501(c)(2)(A) does not exempt municipal ordinances from the general preemptive reach of § 14501(c)(1). However, the Second Circuit and several district courts in this circuit have come to the *opposite* conclusion, finding that § 14501(c)(2)(A) explicitly exempts safety-focused municipal towing ordinances from § 14501(c)(1)." 260 F.3d 424, 439-40 (5th Cir. 2001) (internal citations omitted and emphasis added). Similarly, the California Court of Appeals has acknowledged that, "[w]ith respect to municipal ordinances, as distinct from state statutes, the existing case law is divided." ***People ex rel. Renne v. Servantes***, 103 Cal. Rptr. 2d at 879. Other courts have made the same observation. ***See Petrey v. City of Toledo***, 246 F.3d 548, 560 (6th Cir. 2001); ***Tocher v. City of Santa Ana***, 219 F.3d 1040,1050-51 (9th Cir. 2000); ***Ace Auto Body & Towing, Ltd. v. City of New York***, 171 F.3d at 775.

4. Instead of challenging the petition on these grounds, respondents primarily oppose review on the theory (Opp. 1) that no "practical" split exists. In their view, all courts allow

municipal regulation of ***nonconsensual*** towing by exempting these regulations from preemption under either 49 U.S.C. § 14501(c)(2)(A) or the "municipal proprietor" exception to preemption, which allows municipalities to regulate conduct when they purchase towing services themselves. ***See Bldg. & Constr. Trades Council of Metro Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.***, 507 U.S. 218, 226-29 (1993). And all courts, they then attempt to show, agree that ***consensual*** regulations like those here are preempted under § 14501(c)(1). While respondents are correct that the lower courts' results are consistent when it comes to the regulation of towing services ***purchased*** by municipalities (usually called ***nonconsensual*** towing services), they err in contending that this agreement has any meaningful application to the division in lower-court authority over ***consensual*** towing regulations.

a. The City of Columbus agrees with respondents' contention that, under the municipal proprietor exception, cities retain authority to impose standards and regulations regarding the towing services that they ***purchase***. But that truth does not answer the question whether safety regulations governing ***consensual*** tows are exempt from preemption under § 14501(c)(2)(A), and more essentially whether a lower-court split exists over this issue.

b. The City of Columbus does not agree with respondents' contention (Opp. 1-2) that "no court" has ruled that the local regulation of consensual towing operations is exempt from preemption under § 14501(c)(2)(A). As even a cursory reading of the Second Circuit's opinion in ***Ace Auto*** and the Fifth Circuit's decision in ***Stucky*** makes clear, an express conflict among the courts of appeal has developed concerning the ability of municipalities to promulgate and enforce such regulations. In both ***Ace Auto*** and ***Stucky***, the parties asked the circuit courts to decide the validity of city ordinances that prohibited tow trucks from removing disabled vehicles unless they were summoned by the police (or other specified local

government officials), ***not by the vehicle's owner***. Both ordinances thus regulated ***consent*** tows by purporting to prohibit vehicle owners from hiring a tow truck on their own at an accident scene. The Second Circuit upheld the ordinance because the city had merely exercised the safety regulatory authority delegated to it by the State of New York. The Fifth Circuit, however, reached the opposite result. It concluded that the ordinance did not authorize ***any*** municipal regulation of towing, whether consensual or nonconsensual. Nor was it willing to save the ordinance under the municipal proprietor exception because, when a police officer denies a vehicle owner a choice of tow trucks, the court concluded that he acts like a regulator, not a market participant. ***See Stucky***, 260 F.3d at 434-39 & n.11.

The Second and Fifth Circuits only appear to be considering different types of towing regulations because they use the terms "consensual" and "nonconsensual" differently, a difference that is not relevant to the question at hand but rather concerns the scope of the municipal proprietor exception and § 14501(c)(2)(C). The Second Circuit defined "nonconsensual" tows broadly as "any tow performed without the prior consent or authorization of the owner or operator of the motor vehicle, regardless of the reason for the lack of consent." ***See Ace Auto Body***, 171 F.3d at 777-78 (internal quotations and citation omitted). The Fifth Circuit, however, rejected this definition and held that "nonconsensual" tows are "true nonconsent tows," where the owner of the vehicle is unknown, unavailable, or so badly injured in an accident that he cannot choose a towing company. ***Stucky***, 260 F.3d at 434-35. This difference in nomenclature does not alter the bottom-line difference in outcome regarding the validity of two virtually identical towing regulations. In the last analysis, even the most discriminating dissection of the federal appellate decisions cannot counter this essential point: Five federal courts of appeal have reached different results in assessing the validity of similar towing regulations.

5. Also unpersuasive are respondents' attempts (Opp. 9-12) to distinguish *Michigan Trucking Ass'n v. Michigan Public Service Comm'n*, 571 N.W.2d 734 (Mich. Ct. App. 1997), *appeal denied*, 583 N.W.2d 900 (Mich. 1998), and *People ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870, 879-80 (Cal. Ct. App.), *review denied* (May 16, 2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336). They argue that *Michigan Trucking* is inapposite because it concerned a safety rating system, not towing regulations, and an action by the Michigan Public Service Commission ("MPSC"), not a local government. But these are quintessential distinctions without difference. By upholding the MPSC's safety rules, the Michigan court held that States may delegate their authority to promulgate regulations under § 14501(c)(2)(A) to other governmental agencies created by the State. This holding directly conflicts with the decisions of the Fifth, Sixth, Ninth and Eleventh Circuits, all of which have held that § 14501(c)(2)(A) does not allow such a delegation. Indeed, had the Sixth Circuit embraced this view, it would have led to a different result in this case.

Respondents' effort to distinguish *Servantes* also comes up short. In arguing that the California Court of Appeals' analysis concerning § 14501(c)(2)(A) was *dicta*, respondents get the issue exactly backwards. The court's only *dicta* related to the secondary state law issues that respondents wrongly promote to a holding; in the court's final summation of the decision, it properly characterized its conclusion as relating precisely to the matter on which certiorari is being sought here. *See Servantes*, 103 Cal. Rptr. 2d at 880 ("In summary, we conclude that when, as here, the state has delegated authority to local authorities . . . , the municipal regulations on safety issues fall within the exception of [14501(c)(2)(A)] and are not preempted.") (internal citation omitted).

6. Respondents further err (Opp. 8-9) in suggesting that consensual tows do not implicate core safety issues. In truth, most accidents result in *consensual* tows because the vehicle owners usually remain capable of hiring towing services after the accident. *See Stucky*, 260 F.3d at 435, 436, 437 & n.14. Accordingly, in jurisdictions where municipalities may not regulate the safety of consensual tows, tow trucks will continue to race to accident scenes motivated by the enterprising hope of persuading, or coercing, vehicle owners to accept their services.

Similar public-safety issues also arise in the context of non-accident consensual tows, which occur when a car breaks down late at night and the owner calls a towing company to move the vehicle. As the California Court of Appeals has explained, the acts of getting into a tow truck with a stranger and of driving to the desolate, unsafe and poorly-lit areas where towed cars tend to be stored present acute safety concerns. And it blinks at reality to trivialize these concerns. *See Servantes*, 103 Cal. Rptr. 2d at 878. In point of fact, Columbus attempted to address these safety problems by prohibiting towing without a license and by allowing the City to revoke the license of any operator who lacks "good moral character." *See* Columbus City Code § 549.02, 549.07; Pet. App. 37-A, 40-A. Under the law of the Sixth Circuit, to say nothing of the Fifth, Ninth and Eleventh Circuits, such eminently-sensible regulations are preempted and, as these courts have held, may *not* be saved by the municipal proprietor exception. *See Ours Garage and Wrecker Service v. City of Columbus*, No. 00-3409 (6th Cir. June 19, 2001); Pet. App. 2-A; *Petrey v. City of Toledo*, 246 F.3d 548, 559-63 (6th Cir. 2001).

7. Respondents offer only a tepid defense of the lower-court decision—so tepid in fact that they nowhere explain how their interpretation makes sense of the references to "enact" or "enforce" in § 14501(c)(1). As explained in the petition

(Pet. 17-20), the preemption provision says that "a State, political subdivision of a State, or political authority of 2 or more States may not ***enact or enforce*** a law, regulation, or other provision" relating to towing. 49 U.S.C. § 14501(c)(1) (emphasis added). The safety exemption, however, says that the preemption provision "shall not restrict the ***safety regulatory authority of the State*** with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A) (emphasis added). The language of the two provisions thus demonstrates that the term "safety regulatory authority" is a term of art encompassing the State's ability both to enact and enforce laws and to delegate this authority to local governments or state agencies. Any other interpretation of the safety exemption would make the State powerless to pass safety laws, then delegate their ***enforcement*** to local police (Pet. 20)—a development that would come as news to every state legislature and governor in the country.

8. Also meritless is respondents' suggestion (Opp. 17) that this decision does not deserve review because the Court has rejected three petitions concerning this question before. (Citing ***Ace Auto Body & Towing Ltd. v. City of New York***, 171 F.3d 765 (2d Cir.), ***cert. denied***, 528 U.S. 868 (1999); ***R. Mayer of Atlanta, Inc. v. City of Atlanta***, 158 F.3d 538 (11th Cir. 1998), ***cert. denied***, 526 U.S. 1038 (1999); ***Tocher v. City of Santa Ana***, 219 F.3d 1040 (9th Cir. 2000), ***cert. denied***, 121 S. Ct. 1085 (2001)) In addition to the sheer speculativeness of this contention, respondents make two fundamental mistakes in pressing the point.

To begin, the life cycle of nearly every federal question that makes its way to the Court reveals a pattern of early denials of review followed by a grant of certiorari. Respondents' contention thus merely illustrates the difference between undeveloped divisions of authority, which often evade review, and mature divisions of authority, which often do not.

A review of the earlier petitions confirms this truth and one other relevant point as well. When the ***Ace Auto*** petition was initially filed, no conflict among the circuits existed, and when the ***Mayer*** petition was filed, the conflict was still nascent. The more recent denial of review in ***Tocher*** earlier this year has even less relevance. The ***Tocher*** question presented did ***not*** raise the statutory preemption issue raised here, but rather asked the Court to consider whether the Ninth Circuit's decision was "[c]onsistent with the limitations of the ***Commerce Clause.***" ***See*** Petition of Santa Ana, Calif. in ***City of Santa Ana v. Tocher***, No. 00-916 at i (Nov. 29, 2000).

In marked contrast to these earlier cases, this petition squarely presents the question that has divided the lower courts and does so after five circuit courts and two state courts have attempted to resolve the issue. Respondents do not dispute that the Columbus ordinances invalidated by the Sixth Circuit amount to safety regulations that would otherwise fall under § 14501(c)(2)(A), and they fail to identify any meaningful vehicle problem that would prevent the Court from deciding the question. The only complaint they have registered regarding the utility of reviewing this case is the brevity of the Sixth Circuit's decision. But appellate decisions that turn on prior circuit authority, as this one did, necessarily will be short. That brevity, at any rate, helpfully confirms that in the eyes of the lower court this case turned on an interpretation of law, not on the idiosyncracies of a given municipal regulation or a given fact pattern.

9. All of this is prelude, however, to a final reason for granting the writ, and one confirmed by a review of the prior certiorari petitions filed on this issue. Two years ago, the leading national towing-services organization took the same view of the issue that the City of Columbus has—namely, that review is warranted.

In ***Ace Auto Body***, the Towing and Recovery Association of America, which is "a federation of fifty state towing and

recovery associations," filed an *amici curiae* brief at the certiorari stage. *See* Br. of *Amici Curiae* of the Towing and Recovery Association of America and the United Motorcoach Association in support of the Petition for Certiorari in ***Ace Auto Body & Towing Ltd. v. City of New York***, No. 99-3, at 2 (filed July 23, 1999) ("*Ace Auto Amici* Br."). One of the respondents in this case, the Towing and Recovery Association of Ohio, is an affiliated state association of this national organization. *See* http://www.towserver.com/State%20 Associations.htm. And the other respondent, Ours Garage and Wrecker Service, Inc., is a member of the respondent state association. *See* http://www.trao.org/ memberlist.php3. Thus, at least one respondent (and arguably both respondents) are affiliated with the Towing and Recovery Association of America. In its brief to the Court two years ago, the national association in no uncertain terms described the debate about the meaning of § 14501(c)(2)(A) as raising a "fundamental question concerning what, if any, regulatory authority Congress intended to reserve for States and political subdivisions," *Ace Auto Amici* Br. at 3, and acknowledged that the "Second Circuit's reading of 49 U.S.C. § 14501(c)(2)(A) conflicts *directly* with the Eleventh Circuit's decision in [*Mayer*]," *id.* at 4-5 (internal citation omitted and emphasis added). The association failed to make any distinction between nonconsensual and consensual tows. Quite to the contrary: ***It specifically identified the Columbus ordinance at issue here, Chapter 549 of the Columbus City Code,*** as similar to the Atlanta and New York City requirements considered in *Mayer* and *Ace Auto* and representative of towing safety requirements across the country. *See id.* at 15-16. What was true two years ago has become all the more true today: The issue warrants review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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